

\UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
WASHINGTON D.C. DIVISION

MARBURN ACADEMY, INC.,	:	
	:	
Respondent	:	
	:	
	:	
and	:	Case 09-CA-224092
	:	
MICHQUA LEVI,	:	
	:	
	:	
An Individual .	:	

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**RESPONDENT MARBURN ACADEMY'S  
BRIEF TO THE ADMINISTRATIVE LAW JUDGE**

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## **RESPONDENT'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE**

### **I. INTRODUCTION**

On May 7, 2018, Respondent Marburn Academy (“Marburn”) decided not to renew the employment contract of Charging Party Michqua Levi (“Levi”) for the 2018-2019 school year due to her conduct in the 2017-2018 school year. Specifically, in 2017-2018, Levi developed a pattern of communicating numerous personal gripes in an exaggerated and provocative manner and refusing to engage in effective communications to solve the issues that she raised. Levi claims that her employment contract was not renewed because of alleged protected concerted activity reflected in a letter that she sent on April 10, 2018 to the Board of Directors. In order to support her assertion, Levi has the burden of establishing that 1) she engaged in protected concerted activity; 2) Marburn had knowledge of her activity, and 3) Marburn had animus towards her activity. *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982) (approved by *Transp. Mgmt. Corp.*, 462 U.S. 292 (1983)).

Levi is unable to meet her burden. First, Levi’s letter does not constitute protected concerted activity under the Act. Her letter was a personal cavil about numerous issues at the school unrelated to her terms and conditions of employment, including the math program, the Head of School’s attendance at school events, and the school’s fundraising Gala. See *Eastex v. NLRB*, 437 U.S. 567 (1978). Levi wrote the letter in furtherance of her own personal vendetta arising from her performance evaluation, and her perceived mistreatment after a disagreement that she had with a co-worker. It did not concern any other employees. See *Tampa Tribune*, 346 NLRB 369 (2006). Levi attempted to bolster her letter by stating that other teachers supported it; however, her testimony was unsupported by any other teacher testimony and ultimately

incredible. Second, Marburn had no knowledge of Levi's alleged conversations with other teachers, and was unaware (and still is) that any teachers supported the issues raised in her letter. Finally, Marburn did not exhibit any animus towards protected activity. Instead, when Marburn received the letter, it amicably tried to meet with Levi and resolve her problems by engaging in the Marburn Problem Solving System.

Furthermore, Marburn did not decide to withdraw Levi's employment contract for the upcoming school year based on the letter that she sent to the Board. After Marburn received her letter and attempted to address her concerns, Levi refused to engage in the Marburn Problem Solving System and to act in accordance with Marburn's Core Values. She refused to meet with the Head of the School, and continually used inflammatory language and made accusations towards other members of the Marburn community. See *Good Samaritan Hosp.*, 265 NLRB 618 (1982). Only after Levi refused to engage with management did Marburn decide not to renew her employment contract because of the manner in which she behaved, and her refusal to follow Marburn's problem-solving processes; it was not a result of any protected concerted activity.

### **III. STATEMENT OF FACTS**

#### **A. The Nature of Marburn's Business Places Importance on Workplace Harmony**

Respondent is a non-profit day school that serves the needs of students with learning difficulties. (Tr. at 310-311). Marburn educates around 282 students. The Lower Division, where Levi taught second and third grade, has ten teachers, and educates around 75 students. (Tr. at 311).

#### **B. The Marburn Problem Solving System**

In furtherance of Marburn's mission to its students and its community, it created, with input from every staff member, a set of Core Values that drive the organization. (Tr. at 313). The

Core Values include open, honest, clear and direct communication, which employees resolve to achieve by 1) communicating in an open and honest manner within appropriate channels; 2) using constructive, focused, recursive, and timely communication, and 3) using communication tools in a disciplined manner. (Tr. at 314; RX-32). Marburn's key communication policy is reflected in the Marburn Problem Solving System ("MPSS"), which is "designed to emphasize the resolution of conflict through dialogue, the truthful acceptance of the responsibility, and the willing acceptance of the consequences of one's own behavior. The core principle of the problem solving system is that the conflict resolution dialogue should occur between the particular individuals who are in disagreement or conflict." (Tr. at 315-316; RX-33, pg. 9).

**C. Levi Demonstrates a Failure to Effectively Communicate Throughout the 2017-2018 School Year**

Head of School Jamie Williamson ("Williamson") meets annually with every teacher to maintain positive and open communication. In this annual meeting, he asks three questions: 1) what they love about Marburn, 2) what was going really well for them, and 3) what could be improved upon. (Tr. at 318). During her annual meeting with Williamson, Levi did not even give Williamson the opportunity to raise those questions, but instead forcefully relayed a litany of personal gripes and informed Williamson that she was so upset that she was considering quitting. (Tr. at 319-320). Williamson listened to her concerns, and tried to seek clarification on the issues, but Levi refused to expand upon her generalizations or provide any feedback how her perceived issues could improve. (Tr. at 320). This meeting was atypical, as no other teacher approached Williamson with similar concerns. (Tr. at 320).

**i. Levi's Complaint Causes the Discharge of the Human Resources Manager**

In December 2017, Levi approached Admissions Director Celeste Stevenson ("Stevenson") and informed her that Human Resources Manager Janine Winters ("Winters"),

borrowed \$1,000 from her. (Tr. at 321). Stevenson informed Williamson, and he took immediate action to resolve the issue. Williamson met with Levi, and she informed him that her parents had been stranded on an island during a hurricane. (Tr. at 322; RX-1). After Winters learned about Levi's family, Winters asked Levi for money to get her family member off an island as well. (Tr. at 322; RX-1). Because Williamson was concerned that the Human Resources Manager may have demonstrated poor judgment by borrowing money from a staff member, Williamson asked Levi to document her concerns. When Williamson met with Winters, Winters admitted that she borrowed money from Levi. (Tr. at 323; RX-1). Williamson met with Associate Head of School Scott Burton ("Burton") and Chief Financial Officer Beth Weakley ("Weakley"). As a management team, they decided that Winters' actions were inappropriate and terminated her employment. (Tr. at 323).

**ii. Levi Provocatively Exaggerates Incident with Co-Worker Erin Barr**

On January 19, 2018,<sup>1</sup> Levi forwarded Williamson a chain of e-mail correspondence between the Director of Marketing and Communications Erin Barr ("Barr") and herself. (Tr. at 325; RX-2). When Levi notified Williamson of the situation, she did not seek a resolution. As she stated, "I just want you to know [...], but I was (and still am pissed about being treated like some stupid employee). [...] I felt you should know what happened."<sup>2</sup> However, Williamson felt it was important for him to meet with Levi to discuss the situation as she was clearly very upset about her interaction with Barr. (Tr. at 325).

On January 21, Williamson met with Levi to discuss her concerns. Levi described an extremely aggressive and provocative encounter with Barr. (Tr. at 325). Levi said that Barr got in

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<sup>1</sup>All subsequent dates occurred in 2018, unless otherwise indicated.

<sup>2</sup>Notably, in her e-mail, Levi characterized the incident between herself and Barr as something "ALL of (Lower Division) staff (were) pissed about this" when it only involved her. (RX-2).



her face, and waved her hands in Levi's face.<sup>3</sup> (Tr. at 325). Levi said that Barr made her so angry that she wanted to hit her. (Tr. at 325). Williamson was extremely concerned that one of his teachers was so angry about an interaction with an administrator that she might resort to physical violence, and he felt that the situation needed to be addressed. (Tr. at 326).

On January 22, Levi e-mailed Williamson to express her displeasure with their meeting because "she was the victim and not Erin" and because she was "not going to let an administrator bully and embarrass her that way and have to stew about it and cry all weekend." (RX-4). On January 24, Williamson responded and offered to meet with both women. (RX-4). That same day, Levi agreed to meet, but not before alleging her additional perceived injustices. (RX-5).

Williamson decided to watch the surveillance video of the encounter between Levi and Barr. (Tr. at 326- 327). Upon review, Williamson observed that Levi's characterization of the event was wildly inaccurate. (Tr. at 327). Barr and Levi were about twelve feet apart at all times, and Barr gestured with her hands to her sides. (Tr. at 327-328; RX-35). Williamson was concerned because Levi had described the encounter as a very aggressive one, and there was no way to rectify Levi's version with the actual incident reflected on the video. (Tr. at 372; RX-35).

After reviewing the footage, Williamson determined that although there was a lack of communication on Barr's part, the bigger issue was that Levi elevated the issue, and blew it "out of proportion, and [...] made some really provocative claims around that." (Tr. at 331). Williamson arranged a meeting and mediated the issue with Levi and Barr. Then, Williamson addressed Levi separately and explained to her that it was concerning that she said that she wanted to hit another staff member, and that the video footage did not match her statements. (Tr.

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<sup>3</sup>Levi repeated this version of events in her testimony stating that "[s]he was waving her hands in my face and I reacted by-I walked away from her so I would not inappropriately slap her hands out of my face." (Tr. at 135).

at 331). Levi was adamant that regardless of the footage, she felt that Barr was threatening her. (Tr. at 332).

**iii. Levi Does Not Want to Sign Contract for the 2018-2019 School Year**

In March, Burton met with each teacher to offer them their contract for the upcoming school year. (Tr. at 426). During the meetings, Burton presented teachers with their performance evaluation, their job description, Marburn's Core Values, and their contract for the upcoming school year. (Tr. at 425-426). Burton received a lot of hugs from teachers that year as teachers were extremely excited about the salary increases. (Tr. at 432). None of the teachers complained about their salary during any of the contract meetings. (Tr. at 432).

Burton followed this format for his meeting with Levi, but her meeting was very brief. (Tr. at 426). Levi immediately informed him that she might not sign the contract<sup>4</sup> because 1) she might need to help her daughter with her pregnancy and, 2) her husband was considering retiring and she was concerned about being able to travel with him.<sup>5</sup> (Tr. at 427). In her performance evaluation, completed by Levi's direct supervisor, Miriam Skapik ("Skapik"), one suggestion for improvement was "constructive communication that acknowledges the perspective of others." (GCX-4).

Shortly after their meeting, Levi sent Burton a flurry of e-mails concerning her performance evaluation. (RX-9; RX-10). On April 4, Levi requested a copy of the pay scale, and also requested her individual performance evaluation. (RX-10). Levi testified that she told Burton that she requested the salary bands because "it concerned and upset [her] because it

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<sup>4</sup>Marburn offered Levi a salary of \$59,280.00, which was an increase of \$2,280.00 from the previous year. (GCX-3). Levi's salary has increased substantially throughout her employment with Marburn. In 2013-2014, Levi was paid \$39,750.00 (GCX-2, page 8). Her salary offer for the 2018-2019 school year was an increase of almost 150 percent from her starting salary with Marburn.

<sup>5</sup>Before she was terminated, the Human Resources Director gave Levi permission to take four days off while school was in session in April. Although Burton did not revoke this permission, he made it clear to Levi that, in the future, she should schedule her trips during school vacations. (Tr. at 424).

showed that [she] was in the progressing or just barely meets expectations, and as a teacher of 11 plus years, [...] [she] was concerned that why was [she] still in a progressing category or barely meets expectations when all [her] reviews said that [she] had exceeded expectations.” (Tr. at 45-46). Burton provided Levi with a copy, but advised her that she should not rely upon the document as it was still a work in progress. (Tr. at 427-428). Levi reiterated to Burton that “it was upsetting to [her] to be listed in that category when there were no written criteria for [her] to have been able to exceed expectations.” (Tr. at 46).

Marburn’s salary bands were a work in process. (Tr. at 427; GX-5). They included performance ratings of 1) progressing, 2) meets expectations, and 3) exceeds expectations. (Tr. at 428; GCX-5). Levi was rated in the “meets expectations” salary band.<sup>6</sup> (Tr. at 429-430). A committee of teachers, including Levi’s witness Chris Geisler (“Geisler”), was working on the new evaluation system and the criteria for each category. (Tr. at 428).

Shortly after she received a copy of the salary bands, Levi approached Burton again. (Tr. at 431). Levi told Burton that she was not sure if she was going to sign her contract. Levi also told Burton that she was very upset that Skapik was advised of the incident between Barr and herself. (Tr. at 433-434). Levi presented Burton with a copy of the MPSS with her handwritten notes expressing her concerns. (Tr. at 434; RX-11).

#### **D. Levi’s April 10, 2018 Letter to the Board Was Not Protected Concerted Activity**

On April 10, Levi sent an e-mail to Brian Hicks (“Hicks”), the Chairman of the Board of Directors. The e-mail stated, in part:

I feel very unsupported. [...] Have way too many concerns to type up in this e-mail to you [...] I will list just a few of the greater concerns so you can get a general

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<sup>6</sup>As of the 2017-2018 school year, Levi had been employed with Marburn for six years. (Tr. at 23). Levi was credited with 14 years of teaching service. (Tr. at 429-430).

idea[.] [...] This year I did NOT want to sign a contract to come back. [...] I, as well, as numerous other staff members, have applied elsewhere for new jobs.<sup>7</sup>

2. The staff morale here is at an all low! There is a feeling that Mr. Williamson shows favoritism and a lack of respect for many teachers. Options 1 and 2 of the faculty sign up for the Gala was just 1 example of how little Marburn feels about their teachers. Several of us let Pat, Lucy, and Jennifer Martin-Gledhill know how disturbing options 1 and 2 were to the staff, yet nothing changed, again confirming how admin feels about the staff. PS: many staff members who attended/donated to the gala in the past will not be there this year...that is why!

3. The pay scale grid shows an inaccurate breakdown of staff compensation as Mr. Burton said we are not 'there yet.' If that is the case, why is it 'written that way' and what is the criteria for raises? [...] (GCX-7).

After some additional emails between Levi and Hicks (RX-12 and RX-13) on April 13, Williamson e-mailed Levi thanking her for her feedback, and expressed a desire to work together to resolve her issues. Williamson tried to arrange a time that she could meet with Burton and him to discuss the concerns that she raised. (RX-14).

On April 23, Levi e-mailed Hicks regarding Williamson's request for a meeting. Levi's e-mail stated, in part: "I am NOT comfortable meeting with [Williamson], nor do I feel the need to meet with [Williamson] as I already had my concerns addressed using the Marburn Problem Solving System. [...] My letter was written to inform the board about concerns already discussed with administration, not for answers. (emphasis added). (GCX-9; RX-15).

On April 23, Hicks responded to Levi's e-mail and copied Williamson. Hicks' e-mail advised, "[m]y advice is to meet with the school leadership to address your concerns if you want to have them addressed. If you only wanted to inform, please consider that accomplished." (GCX-9; RX-15).

On April 25, Williamson sent an e-mail to Levi informing her that she needed to meet with administration. Williamson stated, in part, "[p]lease note that not meeting with me is not an

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<sup>7</sup> Levi admitted that this statement was false. She never applied for any other jobs. (Tr. at 171).

option; it is not feasible to have a teacher who refuses to meet with the Head of School.” (GCX-10). On April 26, Levi responded to Williamson’s e-mail, and agreed to a meeting. Levi copied Hicks and Burton on her response. In her response, Levi denied recruiting teachers to write to Hicks. Levi also, again, raised concerns about how her encounter with Barr was handled. Levi also characterized Williamson’s polite request to meet as “aggressive and accusatory.” (GCX-10).

**i. Levi’s April 10, 2018 Letter was Personal and Not Supported by Her Colleagues**

Levi testified that she talked to a dozen teachers about her employment contract. (Tr. at 49). She testified that she discussed her employment contract with Angie Bell, Nicole Fisher, Sammy Smith, Kevin Fish, Sally Sayer, Steven Bean, Jim Fitzner, Lisa Neuhoff, Maggie Alexis, and Leslie Buford. (Tr. at 59-60). However, all of these conversations were uncorroborated.<sup>8</sup> Levi also generally testified that she discussed favoritism with regard to the Gala, and the pay scale as it relates to performance rankings. (Tr. at 50). Levi was vague in her testimony concerning her discussions with other teachers, and was unable to offer any concrete examples. (Tr. at 55; Tr. at 58).

Levi also testified that she discussed the Gala and the pay scale with Geisler. (Tr. at 66).<sup>9</sup> Levi testified that she spoke with Geisler about “not being placed in the correct category for the number of years.” (Tr. at 66). Levi and Geisler’s testimony about this conversation was extremely vague. Geisler testified that they would “text one another with a question or concern,”

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<sup>8</sup>No witness presented to corroborate her testimony, and a review of the text messages with every teacher reveals that Levi did not discuss either the Gala or the pay scale with any teachers by text message. (RX-26; RX-28; RX-29; RX-30).

<sup>9</sup>Levi testified that she and Geisler had conversations about the Gala, and the pay scale by text message. (Tr. at 66; Tr. at 69). Yet, Levi was required to produce all text message communications, beginning in August 9, 2017 and her text messages with Geisler begin on April 9, 2018, and do not indicate that she and Geisler ever discussed the Gala or the pay scale prior to her letter to Board of Directors Chairman Brian Hicks. (RX-20; RX-26).

however there are no text messages that corroborate his statements. (Tr. at 253; RX-26). Additionally, Levi testified that she spoke with Geisler about the options to attend the Gala, but, once again, she never testified to any specifics of those conversations. (Tr. at 69). Geisler was similarly vague about his conversations about the Gala.

Importantly, there is no evidence that Marburn was aware of any of these alleged conversations. (Tr. at 418; Tr. at 445). Geisler testified that he only relayed his conversations with Levi to Burton to the extent outlined in his summary e-mail to Burton, which contains no reference to the evaluation system, the faculty pay scale, or the Gala. (Tr. at 274-275; GCX-12).

**ii. Marburn's Fundraising Gala Does Not Concern Terms and Conditions of Employment**

The Gala is a fundraising event held every year to raise scholarship money for students. (Tr. at 147). It is held outside of school hours, and is open to members of the community. (Tr. at 270). In previous years, the Gala was held off-campus at The Ohio State University campus. (Tr. at 146). In 2018, the Gala was held on site and was sold out before teachers were able to volunteer. (Tr. at 147). Consequently, there was limited room to accommodate all of the people that normally attended the event. (Tr. at 146).

Teachers were not required to attend the Gala, but could volunteer if they chose to do so. (Tr. 270). In March or April 2018, Advancement Director Lucy Godman sent an e-mail out to staff members outlining the three options upon which staff members could attend the event. (Tr. at 337-338; GCX-6). Administrators, division heads, and directors were required to attend the event, which was reflected as option two. (Tr. at 338-339). All other, non-management employees could either attend the event by volunteering or purchasing a reduced fee ticket, which was reflected as option one or three. (Tr. at 339).

**E. Marburn's Decision Not to Renew Levi's Contract Was Not Related to Protected Concerted Activity**

**i. Levi Meets with Marburn to Discuss Her Letter on April 26, 2018**

Before Williamson and Burton met with Levi, the head of the Middle Division, Kristin Hunemann, approached Burton and informed him that a middle school teacher, Robyn Delfino ("Delfino") had approached her with a concern that Levi had asked her to write a letter to the Board of Directors. (Tr. at 440; RX-36). Delfino met with Burton, and informed him that Levi had asked her to write a letter to the Board. (Tr. at 440). Geisler also met with Burton and informed him that he too had been approached to write a letter to the Board. (Tr. at 441).

On April 26, Levi met with Williamson, Burton, and Weakley. Levi expressed, once again, her displeasure regarding the handling of the incident with Barr. Williamson explained why he brought the issue to the attention of both her and Barr's supervisors. (Tr. at 346; Tr. at 438). Williamson then attempted to address each of the concerns Levi raised in her letter so they could create an actionable plan to address them. (Tr. at 346). When Williamson addressed her third listed concern, the pay scale grid, Levi said "it hurt her feelings that she was placed at this level (meets expectations)." (Tr. at 346; Tr. at 439; Tr. at 449). Based on this conversation, both Burton and Williamson understood that Levi was not actually concerned about her salary; her concern was where she was ranked in her performance evaluation. (Tr. at 418; Tr. at 439). As Williamson testified, "it was clear that it wasn't the pay scale at all. It was all about how she was rated in the performance evaluation. [...] [S]he felt that she was exceeding expectations and that hurt[] her feelings where she was categorized." (Tr. at 418). Similarly, Burton testified, "[T]hat cleared it up for me, that it was about where she was in terms of the salary bands, not the amount of money [...] that she was offered. [...] It was clear to me that she was concerned that she was in the meets expectations, and not the exceeds expectations range." (Tr. at 439). Levi never

informed the administration that any other staff members had concerns about the pay scale. (Tr. at 348). In fact, “she vehemently denied reaching out to anybody.” (Tr. at 348; Tr. at 441).

At the conclusion of this meeting, Williamson and Burton were concerned about Levi’s apparent dishonesty in that she vehemently denied approaching other teachers when other teachers volunteered that she had. (Tr. at 348; Tr. at 441). Furthermore, both Williamson and Burton left the meeting concerned that Levi was not working with them to solve any issues. (Tr. at 350-351).

Williamson and Burton decided to document the conversations with Delfino and Geisler in an effort to determine whether Levi was being dishonest. Delfino and Geisler sent Burton e-mails describing their conversations with Levi. (GCX-12; GCX-36). Once Burton and Williamson confirmed that Levi was, once again, being dishonest with them, they decided to create a plan to help resolve Levi’s communication style for the future. (Tr. at 351). Williamson testified that they wanted to address Levi’s “inability to manage communications and the process, the inflammatory and insinuatory comments, verbiage, she would use to describe what happened, how she was always sort of elevating the issue and never sort of looking at it for what it was to allow us to address it.” (Tr. at 352).

**ii. Marburn Issues a Corrective Action Plan, and Decides Not to Renew Levi’s Employment Contract**

On May 7, Williamson, Burton, and Weakley met with Levi and presented her with a corrective action plan. (Tr. at 352; GCX-11). In the corrective action plan, Williamson listed the issues in order of importance. (Tr. at 353). First, “from a communication standpoint, this appeared to be an ongoing pattern that did not seem to be getting better.” (Tr. at 353). Second, he addressed problem solving. The MPSS was a well-known communication tool and Levi should have known that when she had an issue, she needed to resolve the issue directly. (Tr. at 353).



Finally, Williamson sought to resolve the impact that Levi was having in the community as a result of her exaggerations and inability to engage with the management.<sup>10</sup> The goal of the corrective action plan was to provide a framework for Levi to move forward constructively. (Tr. at 354). Levi refused to sign the corrective action plan. (Tr. at 354-355).

After this meeting, Levi indicated absolutely no willingness to resolve her expressed concerns. Instead, she sent the corrective action plan to board members Mike McGovern and Sharon Wolfe. (Tr. at 355; RX-16; RX-17). In those communications, Levi described the corrective action plan as “extortion,” and stated that she “hoped she got fired.” (RX-17, p. 5).

Consequently, as Levi expressed absolutely no interest in reaching a resolution or working with administration, Marburn decided to withdraw the corrective action plan and not renew Levi’s employment for the next school year. (Tr. at 355; Tr. at 407-408).

#### **IV. ARGUMENT**

##### **A. Marburn’s Actions were Lawful**

Marburn lawfully issued Levi a corrective action plan, and lawfully decided not to renew her employment contract for the 2018-2019 school year. In *Wright Line*, the NLRB adopted a two part test for determining whether an employer’s decision to take adverse action against an employee was discriminatorily motivated. First, the General Counsel (“GC”) must show that the employee’s protected activity was a motivating factor for his adverse action. Second, once the first prong is accomplished, the burden shifts to employer to establish that it would have taken the same action even in the absence of protected conduct. *Wright Line*, 251 NLRB at 1089.

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<sup>10</sup>Although the corrective action plan asked Levi to “commit[] to ceasing all active solicitation and recruitment of others to support [her] personal complaints and dissatisfaction” and “agree[] not [to] retaliate against [] staff that were solicited to join the email campaign,” it never said that Levi had to agree that protected concerted activity constituted wrongdoing as a condition of continued employment. (GCX-11; GC1(a) ¶5). In fact, there is no language even similar to the language that the GC alleges. Levi never testified that Williamson ever said she had to admit to wrongdoing, nor did any other witness. (Tr. at 111; Tr. at 351-355).

In order to establish that Levi's protected activity was a motivating factor, the record must establish 1) Levi engaged in protected activity, 2) Marburn had knowledge of Levi's protected activity, and 3) Marburn demonstrated animus towards protected activities. *Id.* The GC failed to establish a *prima facie* case in the instant matter.

**i. The General Counsel Did Not Establish a Prima Facie Case.**

**a. Levi's April 10, 2018 Letter Was Not Concerted.**

Levi's April 10 e-mail to Hicks was not concerted activity under the Act. Section 7 of the Act gives employees the right to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Thus, for Levi's actions to enjoy the protection of the Act, the GC must establish both that 1) the activity was concerted, and 2) the activity was for the purpose of mutual aid or protection. The GC has failed to establish that either element is present in the instant matter.

An employee's activity is concerted if "it is engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Indus. (Meyers I)*, 268 NLRB 493, 497 (1984), rev'd sub. nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied. If the activity is undertaken by an individual employee, "it must appear at the very least it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees." *Meyers Indus. (Meyers II)*, 281 NLRB 882, 885 (1986), enfd. 835 F.2d 1481 (D.C. Cir. 1986), cert. denied 487 U.S. 1205 (1988). It does not include individual action merely because the action *ought* to be a group concern. *Meyers I*, 268 NLRB at 496.

If the only purpose of the conversation was "to advise an individual as to what he could or should do [...], it is an individual, not a concerted activity, and if it looks forward to no action,

it is more likely [...] to be mere griping.” *Daly Park Nursing Home*, 287 NLRB 710, 710-711 (1987); see, e.g., *Alstate Maint., LLC*, 367 NLRB No. 68, fn. 18 (2018) (“[I]t is not irrelevant whether the employee does in fact seek to initiate, induce, or prepare for group action. Indeed, that is the standard announced in *Meyers II* itself”); *Mushroom Transp. Co., Inc. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964). Levi’s complaints were not for the purpose of advancing a group initiative. To the contrary, she expressly stated that she only wanted to inform the Board, and did not desire any further action. (GCX-9; RX-15). Accordingly, her complaints constituted mere gripes, and thus, were not concerted.

Although Levi characterized one concern as the faculty pay scale, she was ultimately concerned about her individual ranking on the pay scale—not the scale itself and not even the wages associated with the ranking.<sup>11</sup> As Levi, herself, described her concerns, “it concerned me and upset me because it showed that I was in the progressing or just barely meets expectations. [...] It was upsetting to me that I was listed in that category...” (Tr. at 45-46).

Williamson and Burton expressly understood that Levi’s own performance ranking was her underlying concern. As Williamson testified, “it was clear that it wasn’t the pay scale at all. It was all about how she was rated in the performance evaluation. [...] [S]he felt that she was exceeding expectations and that hurts her feelings where she was categorized.” (Tr. at 418). Similarly, Burton testified, “It was clear to me that she was concerned that she was in the meets expectations and not in the exceeds expectations range.” (Tr. at 439).

An employee’s personal gripes about her own performance evaluation are not concerted. See *Tampa Tribune*, 346 NLRB 369 (2006) (employee who accused supervisor of unfairly

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<sup>11</sup>Further, just because Levi characterized her concerns in a global manner does not detract from the fact that they were actually her individual concerns. See *Alstate Maint. LLC*, 367 NLRB No. 68 (2018) (rejecting an individual action as concerned merely because of the use of plural pronoun). Levi has a pattern of describing her individual complaints globally. For example, see, *supra*, footnote 3.

criticizing his work was engaged in mere personal griping); *Inked Ribbon Corp.*, 241 NLRB 7 (1979) (employee's denial of a promised wage increase and sick pay benefits purely individual); *M. Block & Sons*, 221 NLRB 28 (1975) (constant gripes about daily route assignments purely personal and not protected); *Capitol Ornamental Concrete Specialties*, 248 NLRB 851 (1979) (personal complaint about condition of an access road on Company property unprotected).

Levi's letter consisted of purely personal concerns that did not seek any group action. Marburn is not aware of any other employees that shared Levi's concern. Accordingly, Levi did not engage in concerted activity under the Act, and the complaint should be dismissed.

**b. Levi's April 10, 2018 Letter Was Not Protected.**

Not only was Levi's letter not concerted, it was not protected. Levi's letter consisted of a rambling list of generalized gripes about the school, including Williamson's attendance at school events, the math program, and attendance options for the Gala. The Supreme Court noted that when "concerted activity bears a less immediate relationship to employees' interests as employees [...] that at some point the relationship becomes so attenuated that an activity cannot fairly be deemed to come within the "mutual aid or protection clause." *Eastex, Inc.*, 437 U.S. at 567-568.

As the Supreme Court warned in *Eastex*, the Gala's relationship to the employees' interests as employees is so attenuated that it cannot be considered for the purpose of mutual aid or protection. The Gala is a fundraising event with the purpose of raising money for student scholarships. It does not impact the employer-employee relationship, or have any impact on terms and conditions of employment. Employees are not required to attend the event, and it is held during non-working time. Furthermore, employees' ability to attend the event did not substantially differ from previous years.

The NLRB has repeatedly found that complaints about issues outside of the direct employer-employee relationship are not protected. See *Co-Op City*, 341 NLRB 341 NLRB 255 (2004) (prohibition on employee participation in Board of Directors' elections did not directly impact terms and conditions of employment); *Harrah's Lake Tahoe Resort*, 307 NLRB 182 (1992) (employee protest regarding employer plan to purchase controlling interest of stock plan unprotected as did not have direct impact on employee-employer relationship).

Likewise, the math curriculum and Williamson's presence at school events do not involve terms and conditions of employment. Complaints about curriculum are essentially complaints about an employer's product, and thus unprotected. See *Nat'l Dance Inst.*, 364 NLRB No. 35 (2016) (complaints about classroom instruction not protected); *Univ. of Chicago*, 274 NLRB 379 (1985). See also *Damon House*, 270 NLRB 143, 143 (1984) (concerted activity of counselors at a drug treatment center found unprotected, where counselors sent a letter attacking the center's executive director and his impact on the adolescent residents); *Waters of Orchard Park*, 341 NLRB No. 93 (2004) (concerns involving patient care are unprotected); *Riverbay Corp.*, 341 NLRB 255, 257 (2004).

To the extent Levi's e-mail expressed generalized complaints about the top leadership or Williamson's leadership in particular, her complaint is also unprotected because it does not specifically relate to Levi's wages, hours and terms and conditions of employment. See *N.Y. Chinatown Senior Citizens Coalition*, 239 NLRB 614 (1978) ("aggravated bickering" directed at a new executive by employees for the purpose of effecting a change in top management not protected); *Retail Clerks Union, Local 770, Retail Clerks Int'l Ass'n*, 208 NLRB 356 (1974) (general complaints about upper level managers are normally unprotected as they do not relate to wages, hours, or other terms and conditions of employment). Accordingly, Levi's April 10 letter

concerned issues unrelated to terms and conditions of employment, and therefore was not protected activity under the Act.

Further, even if Levi's e-mail concerned issues related to mutual aid and protection, the manner upon which she presented those issues would render them unprotected. The NLRB has placed special importance on harmony and accord in employer environments that involve children. For example, in *Good Samaritan Hospital*, the employer provided developmental therapy for learning disabled children. The coordinator and the staff disagreed about the coordinator's management of the program. The NLRB determined that the employees' complaints were "not directed to improve their lot as employees, but were instead an effort on their part to affect the ultimate direction, philosophy and managerial policies of [the employer]." *Good Samaritan Hosp.*, 265 NLRB at 626. As such, the Board determined that the employees' "criticisms and recommendations related to disputes outside the objectives of the mutual aid or protection provisions of [the Act]." *Id.* Further, the NLRB noted that even if the complaints were protected, the manner in which the employees presented them was not. The NLRB noted that due to the sensitive nature of serving children, cooperation and communication among the staff is critical. The employees' constant criticism created a negative and tense environment, and thus the employer's drastic corrective action was to be expected.

Similarly, in *Lutheran Social Service of Minnesota, Inc.*, the employer operated a treatment and custodial home for emotional, troubled, and socially maladjusted children. Over the course of four months, the director received constant criticism from two counselors about the policies. The employer discharged the counselors because their constant criticism was wreaking havoc throughout the home. The NLRB noted, that the counselors' behavior was an "aimless and undirected, consisting of unrelenting complaining about the value of management policies and

the competence and good faith of their managers and coworkers.” Further, the NLRB noted that even if it was protected, the collective behavior did not constitute a labor dispute, instead it was “blind and aimless caviling.” Finally, the NLRB noted the special importance of the employer’s mission stating, “[i]n a place of employment where the mission is to repair distressed young lives, where harmony and accord must certainly be of critically greater significance than in an ordinary industrial setting, disruption of that requisite environment by unstinting criticism deserves close consideration.” *Lutheran Soc. Serv. of Minn.*, 250 NLRB 35 (1980) (emphasis added).

The Supreme Court has also placed special importance on collegiality in academic institutions. *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 680 (1980). The Court noted that because “the Act was intended to accommodate the type of management-employee relations that prevail in the pyramidal hierarchies of private industry,” and not the structure of a university or college, the Court cautioned the Board that “principles developed for use in the industrial setting cannot be imposed blindly on the academic world.” *Yeshiva Univ.*, 444 U.S. at 681; see also *Carleton College v. NLRB*, 230 F.3d 1075 (8th Cir. 2000) (sufficient basis not to renew contract for rude professor the next school year).

Here, when Levi decided to send her letter to Hicks, she decided to direct her aimless gripes towards community members and parents instead of seeking any sort of resolution. Additionally, she aimed baseless accusations at the administration in general, and Williamson in particular. By choosing to present her gripes in this manner, her letter lost any protection under the Act. See *NLRB v. Blue Bell, Inc.*, 219 F.2d 796, 798 (5th Cir. 1955) (“[a]n employee, by engaging in concerted activity, does not acquire a general or unqualified right to use

disrespectful epithets toward or concerning his or her employer”); *Maryland Drydock Co. v. NLRB*, 183 F.2d 538, 539 (4th Cir. 1950).

**c. Marburn Had No Knowledge of Any Alleged Protected Concerted Activity.**

Even if the GC establishes that Levi’s actions constituted protected concerted activity, Marburn had no knowledge that Levi engaged in any conversations with any other teachers about any subjects protected by the Act. In fact, Burton’s conversations with teachers, including Delfino and Geisler, established the contrary—other teachers did not share Levi’s concerns. Further, she did not call any corroborating witnesses. Marburn understood Levi’s April 10 letter to be comprised of Levi’s personal concerns, and her concerns alone. As Levi testified, Marburn focused in the meetings on only her individual concerns, and not any others. Accordingly, the GC cannot establish his burden under *Wright Line*.

**d. Marburn Does Not Have Animus Towards Protected Concerted Activity.**

The GC is unable to present any evidence that Marburn demonstrated animus towards protected concerted activity. Instead, conversely, Williamson met with Levi to discuss her personal gripes on multiple occasions throughout the school year. Any time an employee presented an issue or concern, Marburn would actively engage the employee through the MPSS.<sup>12</sup> Accordingly, the GC is unable to demonstrate animus, and cannot establish a *prima facie* case.

**ii. Marburn Would Have Engaged in the Same Conduct, Absent Levi’s Protected Concerted Activity.**

Marburn lawfully issued Levi a corrective action plan. Assuming, *arguendo*, Levi’s letter constituted protected concerted activity under the Act, Marburn would have issued the corrective

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<sup>12</sup>See, e.g., Marburn successfully used the Marburn Problem Solving System to resolve Angie Bell’s concerns. (RX-38; RX-39).



action plan even absent the protected concerted activity. Marburn decided not to renew Levi's employment contract because Levi refused operate in accordance with the MPSS and its Core Values. Levi was unwilling to speak with the Head of School, or to be a positive and productive member of Marburn's community. Instead, when she was upset or frustrated with a situation, Levi used inflammatory language or made accusations concerning other members of the community. Levi behaved in this disruptive manner on at least two occasions: 1) during her interaction with Barr, and 2) after her performance review. She refused to engage in problem-solving processes and instead chose to complain to the Board of Directors about perceived issues without any stated desire to resolve those issues. Furthermore, she resisted speaking with management personnel who, unlike the Board, actually had input on the issues that she raised. Marburn cannot have a teacher at the school that refuses to speak with management personnel. See *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965) (leeway for untoward behavior during concerted activity "must be balanced against the employer's right to maintain order and respect"). In a school that caters to children, Levi's refusal to cooperate with Marburn's processes and communicate with management created a negative and tense environment. Consequently, Marburn decided to issue her a corrective action plan in an attempt to give her tools to communicate in a more productive manner. Marburn was completely justified in deciding to issue Levi a corrective action plan because of the manner in which she behaved, and her refusal to follow Marburn's problem-solving processes; it was not a result of any protected concerted activity. See, e.g., *Good Samaritan Hosp.*, 265 NLRB 618 (1982).

For the same reasons, Marburn lawfully decided not to renew Levi's employment for the 2018-2019 school year. Levi's continued employment was not solely conditioned on the corrective action plan. Instead, Marburn decided to withdraw the corrective action plan because

after it was presented to Levi, she contacted Board members describing her corrective action plan in inflammatory and insinuatory terms. By undertaking this action, Levi demonstrated that she did not want to strive to communicate in a more productive manner or work with administration. Instead, she continued to refuse to cooperate with Marburn's processes and create a negative and tense environment for Marburn's community partners and children. Marburn was completely justified in deciding not to renew Levi's employment because of the manner in which she behaved, and her refusal to follow Marburn's problem-solving processes; it was not a result of any protected concerted activity.

Furthermore, Marburn's decision to issue Levi a corrective action plan and ultimately not renew her employment contract is also lawful under a *Burnup & Sims* analysis. In *Burnup & Sims*, the employer only violates Section 8(a)(1) of the Act if it discharges an employee based on a good-faith belief that the employee engaged in misconduct during the otherwise protected activity and the GC proves that the employee was not, in fact, guilty of that misconduct. *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 23 (1964); *Westinghouse Electric Corp.*, 296 NLRB 1166, 1173 (1989). The GC is unable to meet that burden here. Levi did refuse to participate in the problem-solving process, and refused to meet with management. Consequently, Marburn could lawfully determine to issue her a corrective action plan and end her employment contract. Accordingly, Marburn lawfully determined to issue a corrective action plan, and not renew Levi's contract, and the Complaint should be dismissed.

**B. Williamson Never Told Levi that She Had to Agree that Engaging in Protected Concerted Activity Constituted Wrongdoing.**

In Paragraph 5 of the Complaint, the GC alleged that Williamson told Levi, verbally and in writing, that she had to agree that protected concerted activity constituted wrongdoing to maintain further employment. There was absolutely no evidence presented to support this

allegation. Nothing in the corrective action plan contains this statement, nor was there any testimony to that effect. Accordingly, the allegation must be dismissed.

**C. Levi's Witnesses Are Not Credible.**

Levi claimed that several teachers shared her personal complaints as set forth in her April 10 letter, but her claims were unsubstantiated as none of the other teachers testified.<sup>13</sup> The failure to call any of the many teachers with whom Levi stated she shared her concerns, other than Geisler, should be considered in determining her credibility, and in ultimately determining that these alleged conversations did not occur. See *Port Printing Ad & Specialties*, 344 NLRB 354, 357 fn. 9 (2005); *C & S Distrib.*, 321 NLRB 404 fn. 2 (1996); and *Queen of The Valley Hosp.*, 316 NLRB 721 fn. 1 (1995). Further, Levi testified that she communicated with these numerous teachers about her personal concerns by text message. However, none of her text messages indicate that she talked with any of the other teachers about the Gala, the faculty pay scale, or performance evaluations. (RX-26; RX-27; RX-28; RX-29; RX-30).

Levi has shown, on multiple occasions, her propensity to be dishonest. In the incident with Barr, Levi reported to Williamson that Barr was in her face. Levi repeated this statement in her testimony stating that “[s]he was waving her hands in my face and I reacted by-I walked away from her so I would not inappropriately slap her hands out of my face.” (Tr. at 135). In a subsequent e-mail, she expressly stated that “I left as quickly as I could without reacting inappropriately by slapping her hands away from me and yelling back at her.” (RX-5). However, the surveillance video clearly demonstrates that Levi’s statement was blatantly false. Barr and Levi were about twelve feet apart at all times. Paradoxically, even though Levi admitted that she expressly told Williamson that she might slap Barr’s hands, Levi repeatedly told Board members

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<sup>13</sup>Interestingly,, Angie Bell the only other teacher who admittedly wrote a letter to the Board, was not called to testify, which strongly suggests that she did not support the personal complaints in Levi’s letter. Ms. Bell participated in the MPSS and her problems were resolved.

and others that she never made any statement to that effect. (RX-6). Additionally, in her April 10 e-mail to Hicks, Levi stated that she applied for other jobs. However, Levi admitted her statement was false as she never applied for any other jobs. (Tr. at 171). Likewise, although she admitted in her testimony that she had informed Williamson, in their November 2017 meeting, that she was so upset that she was thinking of quitting, Levi later denied ever having any expressed any dissatisfaction in her position. (Tr. at 127-128; RX-10). In subsequent communication to Williamson, Hicks and Burton, she stated, “I have never one time expressed dissatisfaction with my position at Marburn.” (RX-10).

In one of her e-mails to Williamson describing the incident with Barr, Levi admitted that even when someone says one thing, she chooses to hear another. For example, she wrote,

[Y]ou said you had not talked to Erin because she was not in on Monday either. [...] To me, that sounded like you inferred my letter was the reason she skipped out on Sunday and Monday. You mentioned to me several more times that I should have a conversation with someone rather than send a note. Every time I heard that, I heard ‘poor Erin should not have been yelled at by you in your note.’ I never heard you once say that what she did to me was way out of line or inappropriate, wrong, etc...so I felt your thinking was ‘poor Erin.’ (RX-5).

Throughout her description of this e-mail, Levi admits that even though one thing was said, she heard quite another. Levi admitted to hearing accusations in Williamson’s innocuous statements, which were simply not said. Accordingly, the weight of the evidence demonstrates that Levi is not a credible witness, and her testimony should be discredited.

Geisler’s testimony was wholly incredible for three demonstrable reasons. First, Geisler testified that he sent an e-mail to Hicks that vanished from all records. Geisler admitted that neither Hicks nor the administration contacted him or acknowledged his e-mail had been sent. Hicks, Burton, and Williamson credibly testified that they never received an e-mail from Geisler. Geisler alleged both the e-mail that he sent to Burton and the e-mail that he sent to Hicks had

disappeared from his sent e-mail box at the school. (Tr. at 276). However, his e-mail to Burton was easily retrievable on the school computer system and produced as recently as August 9, 2018. (GCX-12). Further, although Geisler said that he never deletes his e-mails, he stated in a text message that he deleted everything from his school account weeks ago. (RX-26).

Second, Geisler testified that he and Levi discussed the Gala and the pay scale over text message but there are absolutely no text messages that indicate they did so. (RX-26).

Finally, Geisler said that his concerns with regard to the faculty pay scale were how the salaries were determined, and that there were no clear and defined criteria. However, his statement was demonstrably false. Geisler was uniquely aware of the development of the teacher evaluation system as he was serving on the committee to develop criteria in the evaluation process. He had a meeting concerning the evaluation process on the very day that he spoke with Burton about Levi, and continued to have meetings throughout April 2018. (Tr. at 261; RX-31). The committee was developing the teacher evaluation model, so Geisler knew exactly what the criteria for teacher evaluations was, and how it would change. (Tr. at 272). Accordingly, the weight of the evidence demonstrates that Geisler is not a credible witness, and his testimony should be discredited.

## **V. CONCLUSION**

For the reasons discussed above, Marburn submits that the record evidence fails to support the allegations in the Complaint, and requires a finding and recommended order that the Complaint should be dismissed in its entirety.

## CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2019, a copy of Respondent Marburn Academy's Brief to the Administrative Law Judge was electronically filed via NLRB E-Filing system with the Division of Judges.

Andrew S. Gollin  
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I further certify that on January 25, 2019, a copy of Respondent Marburn Academy's Brief to the Administrative Law Judge was served by e-mail on the following:

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